(8)

No. 85-1804

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-1241

Counsel for Respondent Consolidated Rail Corporation

November 14, 1986

COUNTERSTATEMENT OF QUESTION PRESENTED

Did this Court's adoption of the six month statute of limitations of Section 10(b) of the National Labor Relations Act for hybrid breach of contract/breach of the duty of fair representation cases include the plain statutory requirement that the complaint be both filed and served in order to satisfy the statute of limitations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

No. 85-1804

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure and Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), are set forth in the petition for certiorari.

Rule 4(j) of the Federal Rules of Civil Procedure is set forth in Consolidated Rail Corporation's brief in response to the petition for writ of certiorari.

Rule 4(a) of the Federal Rules of Civil Procedure provides:

> (a) Summons: Issuance.
>
> Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

Rule 4(c)(2) provides:

> (c) Service.
>
> . . .
>
> (2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.
>
> (B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal, or by a person specially appointed by the court for that purpose, only—
>
> (i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. §1915, or of a seaman authorized to proceed under Title 28, U.S.C. §1916,
>
> (ii) on behalf of the United States or an officer or agency of the United States, or

> (iii) pursuant to an order issued by the court stating that a United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.
>
> (C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—
>
> (i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or
>
> (ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).
>
> (D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.
>
> (E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

Rule 4(g) provides as follows:

> (g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under sub-division (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not effect the validity of the service.

COUNTERSTATEMENT OF THE CASE

The facts of this case are not in dispute. Petitioner Thomas West was employed by Respondent Consolidated Rail Corporation (''Conrail''), from February 9, 1981 until November 27, 1981, when he was dismissed for unauthorized possession of alcoholic beverages. On February 9, 1984, Conrail reinstated Petitioner, reducing his discipline from discharge to suspension without back pay. Petitioner returned to work February 14, 1984, accepting the benefits of the company's decision. He has since been working for New Jersey Transit pursuant to employee transfer agreements reached under the Northeast Rail Service Act of 1981. Petitioner communicated no objection to the company's decision from the date of reinstatement to the date of the filing of the complaint in this matter, when he apparently decided he was dissatisfied with not having gotten back pay.

Respondents moved for summary judgment on several theories, including the argument that this action was barred by the six-month statute of limitations found in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), made applicable to hybrid breach of contract/breach of duty of fair representation (''DFR'') cases under the Labor Management Relations Act, 29 U.S.C. §185, *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and adopted by the Court of Appeals for the Third Circuit to apply to breach of contract/duty of fair representation claims under the Railway Labor Act, 45 U.S.C. §§151-188. *Sisco v. Consolidated Rail Corporation*, 732 F.2d 1188 (3d Cir. 1984). Respondents argued that since the complaint, although filed within six months of the alleged accrual date, was not served until well after the six-month period had expired, the complaint was time-barred. App. 17a.[1]

For the purposes of this action, Respondents and Petitioner agree that the summons and complaints in this case were mailed to Respondents on October 10, 1984 and Respondents acknowledged service on dates ranging from October 12, 1984 through November 1, 1984. In addition, for the purposes of this proceeding, it is undisputed that September 24, 1984, when the complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10th, when the complaints were mailed and October 12th, when the first acknowledgment was made, were more than six months after the statute began to run.

[1] Any reference to ''App.'' means the Appendix to the Petition for Writ of Certiorari in this case, followed by the page on which the cited argument can be found.

The District Court granted Respondents' motions, holding that because §10(b) requires unfair labor practice charges to be both filed and served within six months, a fair representation complaint must also be filed and served within the six-month limitation period. App. 14a-17a. The Court of Appeals for the Third Circuit affirmed the District Court's decision, on the basis that the balance of interests struck in *DelCostello* could only be met by requiring both filing and service of the complaint in order to satisfy the statute of limitations period. App. 3a-13a. The Court acknowledged that application of the service provision contained in Rule 4(j) of the Federal Rules of Civil Procedure, in the absence of the service requirement plainly contained in §10(b) of the National Labor Relations Act (''NLRA''), would engraft an additional four months onto the six-month time period within which a plaintiff must serve the complaint and notify the defendant of a pending action. The Appeals Court concluded that this would effectively postpone the finality of any labor dispute, and eliminate the uniformity of limitations periods sought by the Court in *DelCostello*. App. 6a.

SUMMARY OF ARGUMENT

The six-month statute of limitations in Section 10(b) of the NLRA, 29 U.S.C. §160(b) (''§10(b)''), adopted by this Court in *DelCostello* for hybrid breach of contract/DFR cases, includes the plain requirement that the complaint be both filed and served within six months of the date upon which the action accrued.

The issue before the Court in this case is whether its adoption of the §10(b) statute of limitations for hybrid breach of contract/DFR claims includes the service of process requirement plainly set forth in the statutory language. Petitioner West contends that such an interpretation of the *DelCostello* decision is in error. He highlights in endless detail the hardships which may befall a DFR plaintiff trying to make his way into court, and indicates that there is no need to adopt the service rule in §10(b) since Rules 3 and 4(j) of the Federal Rules of Civil Procedure will suffice.

It is Respondent Conrail's position that the service requirement should be included as part of the §10(b) statute of limitations borrowing. As set forth below, the service requirement is clearly an integral part of the statute, and its application conforms with traditional federal policies regarding borrowing of statutory limitation periods to fill gaps in federal law. Moreover, there is nothing unfair or prejudicial to this or any Petitioner by imposing the service requirement, since service is now within the control of the Petitioner. Finally, inclusion of the service requirement in the statutory borrowing

promotes the public policy goals forming the basis for the Court's decision in *DelCostello, i.e.*, specifically, promptness and finality in the resolution of labor disputes and uniformity of limitation periods for similar claims.

ARGUMENT

I. BORROWING BOTH THE FILING AND SERVICE REQUIREMENTS OF SECTION 10(b) IS CONSISTENT WITH TRADITIONAL FEDERAL POLICY.

All parties agree that the statute of limitations which applies to a hybrid breach of contract/DFR claim under the Railway Labor Act is the six-month statute of limitations of §10(b) of the NLRA, 29 U.S.C. §160(b), as adopted by the Supreme Court in *DelCostello,* and applied to Railway Labor Act cases by the Third Circuit Court of Appeals in *Sisco v. Consolidated Rail Corporation,* 732 F.2d 1188 (3d Cir. 1984). The instant case is such a claim.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), states in pertinent part:

> . . . no complaint shall issue based upon any unfair labor practice accruing more than six months prior to the filing of the charge with the Board *and the service of a copy thereof* upon the person against whom such charge is made . . . . (emphasis added)

Petitioner argues that since *DelCostello* was based upon the Court identifying the most suitable statute of limitations to fill a gap in federal law,[2] the statutory borrowing need not include the service requirement, because there is no gap to fill regarding service and satisfaction of the limitations period. Petitioner West alleges that Federal Rules 3 and 4(j) supply the rule in this case. Pb13-16;[3] *see also Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768 (1986).

As set forth below, Petitioner's argument is without merit. The fact that the service requirement is an integral part of the statute of limitations compels its adoption, since this is consistent with federal policy regarding borrowing of limitations statutes to fill gaps in federal law. In addition, Rules 3 and 4(j) do not apply in place of the service requirement of §10(b), but rather, in conjunction with it. Accordingly, the borrowing of the §10(b) statute of limitations clearly includes service of process.

[2] 462 U.S. at 169, n.2.

[3] "Pb," followed by a page number refers to Petitioner's Brief and the specific page referenced.

A. The Service Requirement Is An Integral Part Of The Statute Of Limitations.

The majority of courts which have reviewed the §10(b) statute of limitations have found that the service requirement is an integral part of the statute. *See, Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *West v. Conrail,* 780 F.2d 361 (3d Cir. 1985); *Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. denied,* 105 S.Ct. 2155 (1985); *Thomsen v. United Parcel Service, Inc.*, 792 F.2d 115 (8th Cir. 1986), *cert. pending sub nom. Local 710, International Brotherhood of Teamsters v. Thomsen*, No. 86-340; *Dzieken v. Entenmann's, Inc.*, No. 85 C 9544, (N.D. Ill., E.D., June 2, 1986); *Taylor v. Pathmark*, No. 85-4253 (E.D. Pa., June 10, 1986); *Waldron v. Motor Coils Manufacturing Co.*, 606 F. Supp. 658 (W.D. Pa. 1985), *aff'd*, 791 F.2d 923 (3d Cir. 1986); *Ellenbogen v. Rider Maintenance Corp.*, 621 F. Supp. 324 (S.D.N.Y. 1985); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. 3229 (N.D. Cal. 1984); *Thompson v. Ralston Purina Co.*, 599 F. Supp. 756 (W.D. Mich. 1984) (Section 10(b)'s filing and service requirements apply).[4]

In addition, in the context of other statutes of limitations borrowed by federal courts, it has been held repeatedly that where service of process is plainly part of the statutory limitations language, it is an integral part of the statute of limitations, and thus must be part of the borrowing. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Calhoun v. Ford*, 625 F.2d 576 (5th Cir. 1980); *Fischer v. Iowa Mold Tooling Company, Inc.*, 690 F.2d 155 (8th Cir. 1982); *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

With regard to *Ragan, supra,* a diversity case involving the question of whether the applicable Kansas statute of limitations should be applied in federal court with or without its service requirement, the Court held that since service was a necessary part of the statute, it must be recognized and applied as part of the statute. Evidence that the Court in *Ragan* considered the service requirement an integral part of the statute was the fact that *another* Kansas statute existed, which provided that a civil action be commenced by filing only, a rule identical to Rule 3 of the Federal Rules of Civil Procedure.

[4] *Contra, Simon v. Kroger Co.*, 105 S.Ct. 2155 (1985) (dissent from denial of certiorari); *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985); *Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768 (2d Cir. 1986); *LaTondress v. Local No. 7, IBT,* 102 F.R.D. 295 (W.D. Mich. 1984) (only filing limitation applies).

Ely: *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974). In *Walker v. Armco Steel Corp., supra*, this Court used the same analysis relative to the Oklahoma statute of limitations and the service requirement contained therein.[5]

When a statute of limitations is borrowed by the Court, all aspects of that statutory period, including those provisions regarding tolling and satisfaction, are borrowed.

> Any period of limitation . . . *is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.* Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. *In virtually all statutes of limitations the chronological length of the limitations period is interrelated with provisions regarding tolling, revival and questions of application.* (emphasis added)

Johnson v. REA, 421 U.S. 454, 463, 464 (1975); *see also Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980).

Logic dictates that a limitations period is framed by a commencement date and an ending date which function as its definitive boundaries. The ending date is as important as the accrual date. The §10(b) statutory period, by its terms, runs from the date on which the action accrued to the date of filing and *service* of the charge. It could not be clearer. The *DelCostello* decision made no mention of the necessity to carve out the service requirement. In fact, the Court was silent on that issue. There is no reason why the six-month period would be borrowed and the filing and service requirement would not. *Howard v. Lockheed-Georgia Co.*, 742 F.2d at 613, 614. Service creates the outside boundary for and is clearly part and parcel of the limitations period.

[5] "The substantive link of §97 [dealing with service of process] to the statute of limitations is made clear as well by another provision of Oklahoma law . . . Okla. Stat., Tit. 12, §151 (1971) . . . is the state-law corollary to Rule 3. However, §97, not §151, controls the commencement of the lawsuit for statute of limitations purposes. [Citation omitted] Just as §97 and §151 can both apply in state court for their separate purposes, so too §97 and Rule 3 may both apply in federal court in a diversity action." 446 U.S. at 752, n. 13. And as set forth in Subsection B hereinafter, so too can Section 10(b) and Rules 3 and 4(j) coexist.

B. Traditional Federal Borrowing Policy Compels The Adoption Of The Entire Statute Of Limitations, Including Both The Filing And Service Requirements.

Petitioner argues that because the Court in *DelCostello* stated that its reason for borrowing the §10(b) statute of limitations was to fill a gap in federal law, the service portion of §10(b) should not be considered part of the borrowing, since, as to tolling or satisfaction of the statute of limitations, there was no gap to be filled. According to Petitioner, the "normal rule" in federal question cases is that a statute of limitations is satisfied by filing the complaint and no more (Pb6), even though he concedes that "[t]his Court has never squarely decided that Rule 3 has this significance. . ." (Pb8). In fact, this Court has declined to address this issue where, as in the instant case, the statute of limitations specifically provided that it was not satisfied absent service of the complaint.

Typically, there are two types of statutes of limitations, those that are silent as to tolling and satisfaction, and those which require something more than filing to satisfy the terms of the statute. The statutes of limitations which are silent are generally viewed as being satisfied by filing pursuant to Federal Rule 3. These are more common in federal question cases. It is these cases, with silent statutes of limitations, in which the courts have held that filing alone satisfies Rule 3.[6] However, as to those statutes of limitations which require service, there is no "normal rule." Not only has the Court never squarely addressed the issue as to the role of Rule 3 in satisfying a statute of limitations requiring service in a federal question case (hence our presence here), but it has specifically declined to discuss it.

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), a diversity case, the Court dealt with the issue of whether a borrowed state statute of limitations should be satisfied by filing of a complaint under Federal Rule 3, or by the specific service requirements of the state statute. In deciding that the service requirement of the state statute should apply, this Court pointed out that there is no indication that Rule 3 was ever intended to satisfy the statute of limitations. Rule 3 states: "A civil action is commenced by filing a complaint with the court." It governs "the date from which various timing requirements of

[6] *See*, e.g., *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947); *Moore v. Sid Richardson Carbon & Gas Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); *U. S. v. Wahl*, 583 F.2d 285 (6th Cir. 1978); *Cohen v. Board of Education*, 536 F. Supp. 486 (S.D.N.Y. 1982); *Wells v. Portland, 102 F.R.D.*, 796 (D. Ore. 1984) *Gutierrez v. Vegari*, 499 F. Supp. 1040 (S.D.N.Y. 1980); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1943 (1985).

the Federal Rules begin to run, but does not affect state statutes of limitations." *Walker, supra,* at 751. The Court specifically declined to address the issue of the role of Rule 3 as a tolling provision for statutes of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law. *Walker, supra,* at 751, n.11.

The cases which hold that Rule 3 satisfies the statute of limitations were all decided prior to the effective date of the 1982 Amendments to the Federal Rules of Civil Procedure or were decided based on other case law arising prior to 1983.[7] The standard line of reasoning in these cases evolved from an interpretation of the legislative history of Rule 3, indicating that because the initial formulation of Rule 3 by the Federal Rules Advisory Committee involved proposed language imposing a specific time requirement on service, and that language was ultimately eliminated from the Rule as enacted, Rule 3 should be construed as satisfying the statute of limitations. *Messenger v. United States,* 231 F.2d 328, 329 (2d Cir. 1956); *accord, Moore v. Sid Richardson Carbon & Gas Co.,* 347 F.2d 921 (8th Cir. 1965); *Metropolitan Paving Co. v. Int'l Union of Operating Engineers,* 439 F.2d 300 (10th Cir. 1971), *cert. denied,* 404 U.S. 829 (1971); *U.S. v. Wahl,* 583 F.2d 285 (6th Cir. 1978). "The continued validity of this line of cases, . . . must be questioned in light of the *Walker* case, even though the Court expressly reserved judgment about federal question actions." 128 Cong. Rec. H-9850 (daily ed. Dec. 15, 1982) *reprinted in* 96 F.R.D. 116, 120, n.14.

Notes of the The Advisory Committee on Rules which accompany Federal Rule 3 actually state:

> When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of a complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. . . . The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

[7] H.R. 7154, enacting Amended Rule 4, became effective February 26, 1983.

There is no basis in the Rules or the Advisory Committee Notes to conclude that Rule 3 specifically satisfies a statute of limitations which contains its own service requirements. Without a strong bias by Congress dictating which way Rule 3 should be interpreted, the Walker analysis should prevail.

Although the Notes of the Advisory Committee on Rules clearly do not state that Rule 3 is to be applied to satisfy the statute of limitations, they do provide some insight as to why courts may have applied Rule 3 in that manner. Prior to the 1982 Amendments, as soon as a plaintiff filed his complaint, control of the action was transferred from the plaintiff to the Clerk. The Clerk had the obligation to send the complaint to the marshal for service. There was no apparent concern over the timeliness of service, since the marshal's involvement was accompanied by a strong presumption of validity in judicial eyes. Siegel: *Changes In Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure,* 96 F.R.D. 81, 101. Under those circumstances, it may well have been considered prejudicial to the plaintiff to allow a particular limitations period to continue to run after the filing of the complaint, when the speed and manner of service of process was no longer in the plaintiff's control.

C. The 1982 Amendments To The Federal Rules Provide That Plaintiff Controls Service Of Process.

The 1982 Amendments to the Federal Rules eliminated any basis (if, indeed, there ever was one) for concluding that the filing of a complaint pursuant to Rule 3 automatically satisfies the statute of limitations. The Amendments changed Rules 4(a) and 4(c) to the extent that service of process may now be accomplished under Rule 4(c)(2)(C)(ii) by mailing a copy of the complaint to the defendant, with an acknowledgment form which the defendant must date, sign and return to the plaintiff. Service is now *within the control* of the plaintiff.

In addition to the changes made in Rules 4(a) and 4(c), the Amendments established a new Rule 4(j) which requires that service be accomplished within 120 days of the date the complaint is filed. Such a requirement is a natural outgrowth of the changes in 4(a) and (c), since service is now the responsibility of the plaintiff, and thus could be prone to time delays.

As discussed in Section III hereinafter, Petitioner's argument that Rules 3 and 4(j) should be applied in the absence of the service of process requirement of §10(b), adds *four-months* to the six-month limitation period beyond which a defendant knows he is safe from suit. The legislative history makes it clear, however, that neither Congress nor the Supreme Court intended Rule 4(j) to have that affect.

> If the law provides that the statute of limitations is tolled by filing and service of the complaint, then a dismissal . . . for failure to serve within the 120 days would, by the terms of the law controlling the tolling, bar the plaintiff from later maintaining the cause of action. 128 Cong. Rec. H-9850 (daily ed. Dec. 15, 1982), 96 F.R.D. at 120.
>
> . . .
>
> The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitations has run. Id., n.15.
>
> If the law provides that the statute of limitations is tolled by filing alone, then the status of the Plaintiff's cause of action turns on the Plaintiff's diligence. 96 F.R.D. at 120.

In *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984), the Court of Appeals specifically rejected the argument that Rule 4(j) should be engrafted onto a state statute of limitations requiring both filing and service, and thus, effectively expand by 120 days the period during which the plaintiff could serve the defendant. The Court stated:

> This is a dubious proposition at best in light of *Walker*. . . . Moreover, the legislative history of the amendments shows that Congress recognized the implications of Walker when it considered the amendments to Rule 4(c) . . . and that Congress specifically considered and rejected the argument plaintiff now advances.
>
> 752 F.2d at 42.

Simply put, if both filing and service are required by statute, then the service must be both within the statutory period *and* within 120 days of the filing of the complaint.

The *Walker* and *Morse* cases, and the legislative history applicable to Amended Rule 4 stand for the proposition that the filing of a complaint under Rule 3 does *not* automatically satisfy the statute of limitations. Accordingly, it does not conflict directly with a borrowed limitations statute requiring both filing and service. Rule 3 and the statute of limitations can "exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel Corp.*, 446 U.S. at 752.

Petitioner has provided no compelling argument for distinguishing the borrowing of a federal statute of limitations from the traditional method of borrowing a state limitations period. Petitioner asserts that when courts borrow a statute of limitations in federal question cases, Rule 3 has always been applied to satisfy the statute of limitations. On the contrary, although, as stated previously, the role of Rule 3 has not been addressed, borrowed statutes of limitations in federal question cases have been interpreted as including all of their specific tolling and satisfaction requirements, as in diversity cases. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. REA*, 421 U.S. 454 (1975).[8]

> *In cases based upon federal question jurisdiction, if there are relevant statutory provisions indicating what steps must be taken in order to toll the statute of limitations, they are controlling and the application of Rule 3 is not involved.* However, if the federal statute is silent as to when the statute of limitations is tolled, then the absence of a statutory standard, and the desire to maintain uniformity of procedure, would make the test for commencement in Rule 3 applicable. 4C. Wright and A. Miller, *Federal Practice and Procedure*, §1056, p.177.

The §10(b) service requirement should be considered an integral part of the borrowing, existing in conjunction with Federal Rules 3 and 4(j). "There is no rational basis for departing from traditional standards merely because the borrowed statute is of federal, rather than state origin." *Dzieken v. Entenmann's, Inc., supra*, at 7.

Finally, if the courts were to distinguish borrowing a state rather than a federal limitations period, to the extent that the service requirement would be applied in the former case and not in the latter, then the courts, in effect, would be giving greater recognition to state substantive law than corresponding

---

[8] *See* discussion in Respondent, New Jersey Transit's Brief, p.13, relative to *United States v. Matles*, 356 U.S. 256 (1958); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Burrell v. La Follette Coach Lines*, 97 F. Supp. 279 (E.D. Tenn. 1951), all federal question cases in which Rule 3 has not been applied automatically to satisfy the limitations requirement.

federal law in the same context. Such a situation cannot be the intent of either Congress or this Court.

II. REQUIRING BOTH FILING AND SERVICE TO SATISFY THE STATUTE OF LIMITATIONS IS NOT UNFAIR OR PREJUDICIAL TO PETITIONER.

Petitioner West raises the specter that requiring service of process to satisfy the statute of limitations will cause great hardship to plaintiffs. He suggests numerous examples of ways in which this will occur, none of which are sufficiently compelling to justify carving out the service of process requirement from the §10(b) limitations period.

Petitioner states that it may be difficult to ascertain where the defendants are. He alleges that even if a plaintiff can find the defendants, if any defendant is located across the country, it might be necessary to file the complaint as much as a month ahead of time in order to be sure that service is perfected. However, West fails to acknowledge the uniqueness of a breach of contract/DFR claim. Unlike other types of cases, the plaintiff in this type of action is uniquely familiar with the defendants, and undoubtedly knows where they can be located for service of process. After all, one defendant is the union of which plaintiff has been a member, and one is his employer — both relatively stationary entities. Furthermore, it is difficult to think of a breach of contract/DFR case in which a plaintiff could not sue both entities locally, since under the Federal Rules, a defendant can be sued in the state in which he does business.[9] Surely both the employer and the union are doing business and have offices at or close to the plaintiff's workplace. Even, if for some reason, distance is involved, a plaintiff can use overnight mail or courier services, reducing the necessary time for service to several days at the most.[10]

Petitioner argues that defendants may attempt to evade service and that such avoidance may ultimately prevent the plaintiff from ever completing service. In a breach of contract/DFR case, it is unlikely that a union, whose representatives must be highly visible in order to do their jobs, or an employer, who must also do business on a day-to-day basis, could successfully evade service. Moreover, this is the same objection that was raised when the service-by-mail rule was enacted as part of Rule 4, and neither Congress nor the Advisory Committee found it compelling enough to eliminate mail service as

[9] *See* 28 U.S.C. §1391(c), Rule 17(b) and 4(d)(3) of the Federal Rules of Civil Procedure.

[10] It is doubtful that a plaintiff could serve a defendant across the country in a breach of contract/DFR case in any event, since long-arm jurisdiction under the Federal Rules does not stretch past 100 miles for a case of this sort.

a viable method to complete the process. 128 Cong. Rec. H-9850, 96 F.R.D. at 118.

A plaintiff may choose any of several methods to serve the complaint. He may choose the method of service provided by the forum state (Rule 4(c)(2)(C)(i)). He may use a private process server (Rule 4(c)(2)(A)), or mail method of service (Rule 4(c)(2)(C)(ii)). In addition, he may request that the court have a marshal perfect service, in cases where he suspects it may be difficult (Rule 4(c)(2)(B)(iii)).

Each method has its own manner in which proof of service can be obtained. If plaintiff uses a private process server he can obtain proof by affidavit of the process server. If he uses the marshal, he can obtain the marshal's proof of service. If the plaintiff serves by mail, he can use the acknowledgment form sent to and returned by the defendant as his proof. It should be noted that failure to produce an executed acknowledgment form or proof of service *does not affect the validity of service.* Rule 4(g); *see Morse v. Elmira Country Club,* 752 F.2d at 40. Any proof of actual notice will suffice.

Petitioner suggests that requiring service will produce "battles over service issues." On the contrary, certainty of the date of service can be assured in a breach of contract/DFR case, just as it is for any other complaint which must be served under the Federal Rules within 120 days of the date it is filed. As of this date, there are only thirteen litigated cases involving disputes over the application of the 120-day service requirement under Rule 4(j), and failure to perfect service by mail in a timely manner. Not *one* of them involves an issue as to the exact date of service and whether or not service was completed within or outside the 120 day time limits.[11] There is no reason that such a question should arise more frequently in the statute of limitations context then in the 4(j) context. A plaintiff has the obligation to be diligent in

[11] *Wei v. State of Hawaii*, 763 F.2d 370 (9th Cir. 1985); *Braxton v. U.S.*, No. 85-5403 (E.D. Pa. 1986); *Boykin v. Commerce Union Bank of Union City, Tennessee*, 109 F.R.D. 344 (W.D. Tenn. 1986); *Horsey v. Edward J. Bradley, et al.*, Nos. 84-4264 and 84-4265 (E.D. Pa. 1985); *Williams v. Allen*, 616 F. Supp. 653 (E.D.N.Y. 1985); *Olympus Corp. v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300 (E.D.N.Y 1985); *Griffin v. Argonne National Laboratory, et al.*, No. 83 C 7736 (N.D. Ill. 1985); *Martin v. City of New York*, 627 F. Supp. 892 (E.D.N.Y. 1985); *Korkala v. National Security Agency/ Central Security Service*, 107 F.R.D. 229 (E.D.N.Y. 1985); *Brown v. Rinehart*, 105 F.R.D. 532 (D.C. Ark. 1985); *Lammers v. Conrad*, 601 F. Supp. 1543 (E.D. Wis. 1985); *Coleman v. Greyhound Lines, Inc.*, 100 F.R.D. 476 (D. Ill. 1984). All of these cases involve whether or not plaintiff used due diligence in trying to perfect service, whether or not there are any equitable tolling arguments, and whether or not the court should dismiss the action for failure to serve in a timely fashion, or grant the plaintiff more time.

his attempts to complete and provide proof of service. He must merely do it within six months in order to satisfy the statute.

Petitioner states that borrowing the service requirement could have the effect of making the suit against one party timely, and against the other party untimely. That is true. However, unless the plaintiff's motivation involves seeking out the "deeper pocket", such a result should be inconsequential, since the burden on the plaintiff is the same whether or not all the defendants are timely served. In a breach of contract/DFR case, to prevail against either party, the plaintiff must not only show that the discharge or discipline was contrary to the contract, but also that the union breached its duty. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976). The employee may sue one defendant, the other, or both, but the case he must prove is the same in any event. *DelCostello,* 462 U.S. at 165.

Finally, despite Petitioner's litany of reasons why requiring service is prejudicial to the interests of a plaintiff in a breach of contract/DFR case, none of these arguments are provided in his own defense. In fact, Petitioner West has never indicated any justification for his failure to serve the Respondents until almost three weeks after the Complaint was filed. In the event that Petitioner had acted with due diligence and still had problems serving Respondents, he, like any other plaintiff, could always have alleged circumstances which would justify an equitable tolling of the limitations requirement. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). His failure to do so speaks for itself.

III. BORROWING THE SECTION 10(b) SERVICE REQUIREMENT IS NECESSARY IN ORDER TO MEET THE DELCOSTELLO PUBLIC POLICY GOALS OF PROMPTNESS AND FINALITY IN THE RESOLUTION OF LABOR DISPUTES, AND UNIFORMITY OF LIMITATION PERIODS FOR SIMILAR CLAIMS.

Petitioner West contends that the Court, in *DelCostello,* did not intend to adopt the service of process portion of §10(b) because the service requirement serves a different function in an administrative case than in a judicial proceeding, and because the service requirement would allegedly "frustrate the policies underlying *DelCostello,*" endangering the enforcement of the duty of fair representation, Pb. 16. He gives a painfully detailed description of the hurdles which a DFR plaintiff must overcome in order to get into court, and essentially contends that service of process would be just one more unfair burden imposed upon the Petitioner, frustrating his right to have unjust discipline set aside. Petitioner's argument is unpersuasive.

DelCostello and supporting law indicate clearly that the borrowing of the §10(b) limitation period is an adoption of the statutory period as a whole, including its service requirement.[12] In *DelCostello,* the Court reviewed the development of the hybrid breach of contract/DFR claim, and discussed the need to borrow a suitable statute of limitations or other rule of timeliness to govern such a claim since there is no federal statute of limitations expressly applicable. The Court concluded that the appropriate time period depended upon ascertaining which federal interests, if any, were at stake in a breach of contract/DFR case. The Court recognized the necessity to uphold the well established federal interest in prompt and final resolution of labor disputes, *see Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966), and the need for uniformity of limitations periods.

After reviewing statutory limitations periods appropriate for borrowing, this Court chose the six-month period contained in §10(b) of the NLRA, referring to it as a time period "actually designed to accommodate a balance of interests very similar to that at stake here." *DelCostello,* 462 U.S. at 169. The Court pointed out that a breach of a union's duty of fair representation is often an unfair labor practice, characterizing the two types of actions as including "a substantial overlap" of the same claims. Finally, the Court relied on Justice Stewart's concurrence in *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981), holding that the §10(b) six-month statute of limitations period is the most appropriate timeliness requirement because it is attuned to the proper balance of federal interests in promptness and finality of labor disputes and an employee's right to have unjust discipline set aside.

Assuming *arguendo* that Petitioner's theory prevailed, *i.e.*, that the service requirement contained in §10(b) did not apply, and that Federal Rules 3 and 4(j) governed both the satisfaction of the statute of limitations and filing and service of a breach of contract/DFR complaint, then a plaintiff could presumably file his complaint at the end of the six month period and wait an additional 120 days days in order to perfect service. A defendant in such a case would be required to wait 120 days *beyond* the six month statutory period in order to be assured that he was no longer vulnerable to suit — a period of time fully 66% greater than six months, and greater than the same defendant would be required to wait in order to be assured he was not being charged with an unfair labor practice under the NLRA. See *Dzieken v. Entenmann's,* No. 85 C 9524, at 8. Surely, this would eliminate the uniformity of limitations periods sought by this Court and recognized as being so important.

---

[12] *See* cases cited on p. 7.

Furthermore, in *DelCostello,* this Court reviewed many statutory periods beyond six months, including one year, and found them to be inappropriate because, in this context, they would conflict with the federal interest in the rapid resolution of labor disputes. The Court chose the §10(b) period because it did *not* conflict with this objective.

Petitioner West raises the argument that the service of process provisions of §10(b) should not be considered part of the borrowing for breach of contract/DFR claims, because the administrative NLRA procedures are different from judicial procedure. Pb 7. However, this is precisely the argument which the Supreme Court addressed and dismissed in a footnote to its opinion:

> . . . With all respect, we think that this observation while undoubtedly correct, is beside the point . . . we are applying a different cause of action, not because the legislature enacting that limitation provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law . . . 462 U.S. at 169, footnote 21, referring to United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981).

The purpose of a statute of limitations is to provide a time after which the defendant is put on notice that he no longer has to worry about being sued. The defendant is first notified that a claim is being pursued against him by *service* of that claim. It makes little difference whether it is a charge being filed with the NLRB or a complaint being filed in court — in either event, the defendant cannot rest until he knows that he is no longer vulnerable to a possible claim. Therefore, service has the same effect in both contexts.

Petitioner suggests that a logical extension of the argument supporting adoption of the service of process requirement would be to require the adoption of all of the other procedural requirements of §10(b), and indeed, many of the procedural rules of the NLRB not even contained in §10(b). Pb9, n.3; Pb17, n.7. However, such a suggestion stretches the clear intent of the Court beyond reason. In *DelCostello,* this Court indicated repeatedly that it was adopting the six-month *limitations period* of §10(b). Since the limitations period has as its boundaries the accrual date and the date of service, the service of process requirement is logically a part of the borrowing of the limitations period. This is not true of the remainder of §10(b), or any NLRB procedural rules outside of §10(b).

Failure to include the service requirement as an integral part of the §10(b) limitations period runs counter to the precise policy reasons this Court borrowed the §10(b) limitations period in the first place. It would prolong the

labor dispute, postpone its finality, and eliminate the uniformity between limitations periods for similar labor claims. Accordingly, the borrowing of the §10(b) statute of limitations for hybrid breach of contract/DFR cases must include the service provision.

CONCLUSION

The borrowing of the six-month statute of limitations in §10(b) for hybrid breach of contract/DFR cases should be read to include the service requirement since such an interpretation is consistent with traditional federal borrowing policies and is an interpretation which is not prejudicial to Petitioner. In addition, inclusion of the service requirement promotes the public interest in prompt and final resolution of labor disputes and the need for uniformity in limitations periods for similar causes of actions.

Accordingly, Respondent Conrail respectfully requests that this Court affirm the decision of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON

COUNSEL FOR RESPONDENT
CONSOLIDATED RAIL CORPORATION